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7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 United Food & Commercial Workers
Local 99; et al.,

11 Plaintiff,

12 vs.

13 Jan Brewer, et al.,

14 Defendants.

Case No: CV11-921-PHX-GMS

**STATE DEFENDANTS' RESPONSE TO
MOTION FOR PRELIMINARY
INJUNCTION**

(Oral Argument and Evidentiary Hearing
Requested)

15
16 **Introduction**

17 Defendants Jan Brewer, Tom Horne, Ken Bennett, and Randall Maruca oppose
18 Plaintiff's Motion for a Preliminary Injunction, which seeks to enjoin SB 1365. These
19 State Defendants have raised some threshold jurisdictional issues in a motion to dismiss
20 (doc. 50) that should dispose of all or most of this action. If the action is not dismissed,
21 the motion for preliminary injunction should be denied because SB 1365 is neither
22 preempted nor unconstitutionally vague.

23 **I. FACTUAL BACKGROUND**

24 Plaintiff United Food & Commercial Workers Local 99 ("UFCW") is a union
25 with 18,000 members in Arizona. (McLaughlin Decl, ¶ 1[Doc. 19].) James McLaughlin
26 is its president and Roberta Colbath is one of its members. (FAC, ¶ 8) Most UFCW
27 members work in retail stores and are covered by the National Labor Relations Act
28 ("NLRA"). (*Id.*) Others are covered by Arizona's Agricultural Employment Relations

1 Act. (*Id.*) (McLaughlin Decl., ¶ 2.) Upon applying for membership, members are asked
 2 to sign a “check-off authorization” that allows the employer to deduct the member’s
 3 union dues from his paycheck. (McLaughlin Decl., ¶ 3 & Ex. 2.) These check-off
 4 authorizations typically provide:

5 This authorization and assignment shall be irrevocable for a
 6 period of one (1) year from the date of execution or until the
 7 termination date of the agreement between the Employer and
 8 Local 99, whichever occurs sooner, and from year to year
 9 thereafter, unless not less than thirty (30) days and not more
 10 than forty-five (45) days prior to the end of any subsequent
 yearly period or termination date of the agreement between the
 Employer and Local 99, I give the Employer and Union written
 notice of revocation bearing my signature thereto.

11 (*Id.*) Most UFCW members pay their dues through the payroll deduction method. (*Id.*, ¶
 12 2.)

13 The UFCW spends some union treasury money on lobbying and political issues.
 14 (*Id.*, ¶ 5.) In 2009, it reported on its annual disclosure to the U.S. Department of Labor
 15 spending \$173,125 on lobbying and political activities. (*Id.*) In 2008, it reported a larger
 16 amount of political spending. (*Id.*) The UFCW also has a separate segregated political
 17 action committee for which members may sign up separately to contributed via payroll
 18 deduction. (*Id.*)

19 Plaintiff United Association of Plumbers and Steamfitters Local 469 (“Local
 20 469”) is a union with 2,500 members in Arizona. (FAC ¶ 9.) Phillip McNally is its
 21 business manager and David J. Rothans is one of its members. (*Id.*) One of Local 469’s
 22 sources of revenue is membership dues. (McNally Decl., ¶ 19 [Doc. 17].) In paying
 23 dues to the union, members have several payment methods to choose from. (*Id.*, ¶¶ 21-
 24 22.) Some members authorize union dues to be deducted from their paychecks by
 25 executing a form similar to that used by the UFCW. (*Id.*)

26 Local 469 is an affiliate of the UA International. (McNally Decl., ¶ 5 [Doc. 17].)
 27 Local 469 pays to UA International a monthly “per capita” fee, and UA International
 28 uses a portion of that money for political purposes. (*Id.*, ¶ 6.) In its most recent annual

1 financial report filed with the U.S. Department of Labor, Local 469 reported that twelve
 2 percent of its total expenditure of treasury assets was for political activities and lobbying.
 3 (*Id.*, ¶ 16.)

4 In April 2011, the Arizona Legislature also passed and the Governor signed SB
 5 1365. (FAC, ¶ 13.) The measure adds A.R.S. § 23-361.02. Subsection A provides that,
 6 “A public or private employer in this state shall not deduct any payment from an
 7 employee’s paycheck for political purposes unless the employee annually provides
 8 written or electronic authorization to the employer for the deduction.” Subsection B
 9 provides that if a deduction is made from an employee’s paycheck for multiple purposes,
 10 the entity to which the deductions are paid must provide a “statement indicating that the
 11 payment is not used for political purposes or a statement that indicates the maximum
 12 percentage that is used for political purposes.” These provisions go into effect on
 13 October 1, 2011. (FAC ¶ 3.)

14 Subsection C of the new statute directs the Attorney General to adopt rules for
 15 “the acceptable forms of employee authorization and entity statements.” Section D
 16 provides for a \$10,000 civil penalty for each violation when an employer improperly
 17 deducts payments from an employee’s paycheck for political purposes, or when an entity
 18 submits an inaccurate statement; and it makes the Attorney General responsible for
 19 imposing and collecting the civil penalties.

20 **II. LEGAL DISCUSSION**

21 **A. Legal Standard**

22 A party seeking a preliminary injunction must establish that it is likely to succeed
 23 on the merits, that it is likely to suffer irreparable harm in the absence of preliminary
 24 relief, that the balance of equities tips in its favor, and that an injunction is in the public
 25 interest. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365,
 26 374 (2008); *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052
 27 (9th Cir. 2009). “A preliminary injunction is an extraordinary and drastic remedy, one
 28

1 that should not be granted unless the movant, by a clear showing, carries the burden of
2 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

3 **B. Plaintiffs Cannot Mount a Facial Challenge.**

4 The Plaintiffs are seeking a preliminary injunction to restrain “enforcement of SB
5 1365 in its entirety, or at a minimum, as to Plaintiffs and their members covered by
6 existing contracts and by the National Labor Relations Act.” (Doc. 14.) They are thus
7 attempting, at least in part, a facial challenge to the enactment. “A facial challenge to a
8 legislative Act is . . . the most difficult challenge to mount successfully, since the
9 challenger must establish that no set of circumstances exists under which the Act could
10 be valid.” *United States v. Salerno*, 481 U.S. 739, 724 (1987).

11 Plaintiffs cannot meet this heavy burden. Their primary argument is that SB 1365
12 is preempted by federal labor law. One of the many flaws in that argument is that SB
13 applies to employers who are not covered by federal labor law, and thus there is no
14 preemption. SB 1365 applies to both public and private employers. The NLRA does not
15 cover public employment, *see* 29 U.S.C. § 152(2), and States are free to regulate in that
16 area. The NLRA is also inapplicable to agricultural employees. 29 U.S.C. § 152(3).
17 States are therefore free to regulate agricultural employment, and some members of the
18 UFCW are covered by Arizona’s Agricultural Employment Relations Act. (FAC, ¶ 8.)
19 There is no preemption issue as to public employees and agricultural employers, and
20 there is no dispute that SB 1365 may be lawfully applied to those employees.

21 Consequently, assuming there’s a justiciable controversy, the Plaintiffs can only
22 make an as-applied challenge. The factual record for such a challenge is inadequate,
23 however. More information is needed about how SB 1365 will affect Plaintiffs, and that
24 will require some discovery and a hearing.

25 **C. Plaintiffs are Unlikely to Succeed on the Merits.**

26 **1. SB 1365 is not preempted by federal labor law.**

27 **a. LMRA Preemption.**

1 Plaintiffs argue that federal labor law preempts SB 1365. They rely heavily on
2 *SeaPak v. Industrial, Technical & Professional Employees*, 300 F. Supp. 1197, (S.D. Ga.
3 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd w/o op.*, 400 U.S. 985 (1971). But
4 *SeaPak* is factually distinguishable and, furthermore, preemption doctrine has evolved
5 greatly in the half-century since that case was decided. For those reasons, *SeaPak* is
6 neither controlling nor persuasive regarding SB 1365.

7 The issue in *SeaPak* was whether employees who had authorized their union dues
8 to be deducted from their paychecks could revoke their authorizations at will. The
9 employer contended that they could because, under Georgia's right-to-work law, the
10 employees could not be compelled to join or support a union. The union contended that
11 the employees could not revoke their authorizations because, under the Labor
12 Management Relations Act (LMRA), 29 U.S.C. § 185 *et seq.*, the authorizations could
13 be irrevocable for as long as one year. The court pointed out that Section 302(c)(4) of
14 the LMRA, 29 U.S.C. § 186(c)(4), permits an employer to deduct an employee's union
15 dues from his paycheck if the employee provided "a written assignment which shall not
16 be irrevocable for a period of more than one year." The court concluded that "[t]he area
17 of checkoff of union dues has been federally occupied to such an extent under [§] 301
18 that no room remains for state regulation in the same field." *Id.* at 1200.

19 Here, SB 1365 does *not* provide that dues check-off authorizations are revocable
20 at will, as the state regulation in *SeaPak* supposedly did. Indeed, SB 1365 does not alter
21 the way that employees authorize the deduction of union dues for representational
22 purposes. It simply says that employees (not just union employees) must provide annual
23 authorizations for money to be deducted from their paychecks for political purposes.

24 Moreover, the subsequent development of § 301 preemption casts doubt on the
25 field-preemption rationale used in *SeaPak*. Preemption based on § 301 of the LMRA
26 "preempts state law only insofar as resolution of the state-law-claim requires the
27 interpretation of a collective-bargaining agreement." *Lingle v. Norge Div. of Magic*
28 *Chef*, 486 U.S. 399, 410 n.8 (1988); *see also Burnside v. Kiewit Pac. Corp.*, 491 F.3d

1 1053, 1059 (9th Cir. 2007) (§ 301 preemption analysis requires determination whether a
2 claim is substantially dependent on analysis of collective-bargaining agreement). In
3 *Lividas v. Bradshaw*, 512 U.S. 107 (1994), the Court held that a state law claim for a
4 penalty charge for late payment of wages was not preempted by § 301 because, although
5 the court might have to consult the collective-bargaining agreement to determine what
6 wages were due, the primary text for deciding whether *Lividas* was entitled to a penalty
7 was not the Food Store contract, but a calendar.” *Id.* at 124; *see also Soremekum v.*
8 *Thrifty Payless, Inc.* 500 F.3d 978, 991 (9th Cir. 2007) (state-law claims for unpaid
9 wages are not preempted when the court is required simply to apply the terms of a
10 collective bargaining agreement).

11 These and many other cases teach that field preemption based on § 301 of the
12 LMRA is limited to situations where a party makes a claims that requires interpretation
13 of a collective bargaining agreement. No one here is making such a claim.

14 The other principal case cited by Plaintiffs is *Local 514, Transport Workers*
15 *Union of America v. Keating*, 212 F. Supp.2d 1319 (E.D. Okla. 2002). The court there
16 ruled that § 1A(C) of Oklahoma’s right-to-work law was preempted by the LMRA.
17 Although the court cited to *SeaPak*, it did not adopt the field preemption reasoning of
18 *SeaPak*. The *Keating* court recognized that § 164(b) of the LMRA allowed states to pass
19 right-to-work laws. But it found that the challenged provision of Oklahoma’s law, which
20 made dues checkoffs revocable at will by the employee, conflicted with § 186(c)(4),
21 under which dues checkoff arrangements may be irrevocable for up to a year. *Id.* at
22 1327. Because of this conflict, the court held that the Oklahoma law was outside the
23 authority granted under § 164(b) and therefore preempted.

24 Arizona has adopted right-to-work laws. *See* Ariz. Const., § 25; A.R.S. § 23-
25 1302. Under these laws, employees in Arizona may not be required to join or support a
26 union as a condition of employment. SB 1365 is appropriate right-to-work legislation
27 because its authorization provisions protect the right of Arizona employees to choose
28 whether or not to provide financial support for union political activities. It does not

1 make checkoff authorizations terminable at will and does not conflict with § 186(c)(4).
 2 For that reason, SB 1365 is within the authority granted to states under § 164(b) and is
 3 not preempted.

4 Plaintiffs also cite to *Nevadans for Fairness v. Heller*, 1998 WL 357316 (Nev.
 5 Dist. Ct. 1998). *Heller* is an unpublished decision of a Nevada state trial court. Except
 6 in very limited circumstances, “[a]n unpublished opinion or order of the Nevada
 7 Supreme Court shall not be regarded as precedent and shall not be cited as legal
 8 authority.” Nev. Sup. Ct. Rule 123. If an unpublished opinion of the Nevada Supreme
 9 Court cannot be cited, then neither can an unpublished decision of a Nevada trial court.
 10 The Ninth Circuit and Arizona courts have also condemned the practice of citing
 11 unpublished opinions. *See Pedroza v. BRB*, 624 F.3d 926, 931 (9th Cir. 2010) (noting
 12 that “an unpublished decision is not precedent for our panel”); *Hall v. Smith*, 214 Ariz.
 13 309, 313 ¶ 9 n.3, 152 P.3d 1192, 1196 ¶ 9 n.3 (App. 2007) (“It is improper to cite out-of-
 14 state, unpublished memorandum decisions.”); *Hourani v. Benson Hosp.*, 211 Ariz. 427,
 15 435, ¶ 27, 122 P.3d 6, 14, ¶ 27 (App. 2005) (refusing to consider unpublished district
 16 court opinion from Louisiana). *Heller* should not be considered.

17 **b. NLRA Preemption.**

18 Plaintiffs also claim that SB 1365 is preempted by the NLRA, although they do
 19 not develop the argument and the main cases they rely on for their preemption argument
 20 (*SeaPak* and *Keating*) do not endorse that theory. The NLRA contains no preemption
 21 clause. Courts should “sustain a local regulation unless it conflicts with federal law or
 22 would frustrate the federal scheme, or unless the courts discern from the totality of the
 23 circumstances that Congress sought to occupy the field to the exclusion of the states.”
 24 *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48 (1985).

25 In the context of the NLRA, the Supreme Court has developed two preemption
 26 doctrines. The first, *Garmon* preemption, forbids state and local regulation of activities
 27 arguably protected or prohibited by sections 7 or 8 of the NLRA. *See San Diego Bldg.*
 28 *Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). The second, *Machinists*

1 preemption, prohibits state regulation of areas that Congress intended to be unregulated.
2 *Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 140 (1976). Neither
3 of these doctrines apply here.

4 In *Metropolitan Life*, the Supreme Court considered whether a Massachusetts
5 statute requiring health-insurance policies to provide a certain minimum of mental-health
6 protection was preempted by ERISA or the NLRA. One of the parties argued that since
7 welfare benefits are a mandatory subject of bargaining under the labor law, the NLRA
8 preempted any state attempt to impose minimum-benefit terms. The Court rejected that
9 argument, explaining that what Congress was addressing in the NLRA “was entirely
10 unrelated to local or federal regulation establishing minimum terms of employment.”
11 471 U.S. at 754. The Court said the minimum labor standards are laws that “affect union
12 and nonunion employees equally, and neither encourage nor discourage the collective-
13 bargaining processes that are the subject of the NLRA.” *Id.* at 755. The Court found
14 that there was “no suggestion in the legislative history of the [NLRA] that congress
15 intended to disturb the myriad state laws then in existence that set minimum labor
16 standards, but were unrelated in any way to the processes of bargaining or self-
17 organization.” *Id.* at 756.

18 In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), an employer challenged
19 on preemption grounds a state statute requiring employers to provide severance pay to
20 certain employees. The court rejected the preemption claim, reasoning that “the mere
21 fact that a state statute pertains to matters over which the parties are free to bargain
22 cannot support a claim of preemption, for there is nothing in the NLRA . . . which
23 expressly forecloses all state regulatory powers with respect to those issues . . . that may
24 be the subject of collective bargaining.” *Id.* at 21-22. The Court concluded that the state
25 law was “not preempted by the NLRA, since its establishment of a minimum labor
26 standard does not impermissibly intrude upon the collective-bargaining process.” *Id.* at
27 23.

1 SB 1365 is a law of general application. It establishes a minimum labor standard
 2 and does not intrude on the collective bargaining process. It is therefore not preempted
 3 by the NLRA.

4 **2. SB 1365 is not unconstitutionally vague.**

5 Plaintiffs next argue that SB 1365 is impermissibly vague. A statute is
 6 impermissibly vague if it fails to provide people of reasonable intelligence a reasonable
 7 opportunity to understand what conduct it prohibits, or if it authorizes arbitrary and
 8 discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A statute can
 9 also be vague if it operates to inhibit the exercise of First Amendment freedoms. *Comite*
 10 *de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1193 (9th
 11 Cir. 2010). Speculation about possible vagueness in hypothetical situations not before
 12 the court will not support a facial attack on a statute when it is surely valid in the vast
 13 majority of its intended applications. *Hill*, 530 U.S. at 733 (citation omitted).

14 In *Holder v. Humanitarian Law Project*, ___U.S.___, 130 S. Ct. 2705 (2010), the
 15 Supreme Court rejected a vagueness challenge to a federal statute that makes it a crime
 16 to provide “material support” to a foreign terrorist organization. The statute defined
 17 material support to include “training,” “expert advice or assistance,” “service,” and
 18 “personnel.” The court explained that although “the scope of the material-support statute
 19 may not be clear in every application, . . . the statutory terms are clear in their application
 20 to plaintiffs’ proposed conduct, which means that plaintiffs’ vagueness challenge must
 21 fail.” *Id.* at 2720. The Court further stated that even assuming “the material-support
 22 statute implicates speech, the statutory terms are not vague as applied to plaintiffs.” *Id.*

23 In this case, Plaintiffs first object to parts of the definition of “political purposes.”
 24 Under SB 1365, if a deduction is used for multiple purposes, the entity to which the
 25 deduction is paid must provide the employer with a statement indicating “the payment is
 26 not used for political purposed or a statement that indicates the maximum percentage of
 27 the payment that is used for political purposes.” Subsection I defines “political
 28 purposes” as “supporting or opposing any candidate for public office, political party,

1 referendum, initiative, political issue advocacy, political action committee or similar
2 group.” Plaintiff’s complaint that two of these terms, “political issue advocacy” and
3 “similar group,” are unduly vague.

4 “Political issue advocacy” is a term of “common understanding” that provides a
5 person of ordinary intelligence a reasonable opportunity to know what is required to be
6 reported. *See Hill*, 530 U.S. at 732. Courts have had no difficulty rejecting vagueness
7 challenges to such common terms, especially when used in combination with terms that
8 provide unquestioned clarity. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 608
9 (1973) (holding that statute forbidding state employees from, among other things,
10 soliciting contributions “for any political organization, candidacy or other political
11 purpose.” was not vague); *Human Life of Washington, Inc., v. Brumsickle*, 624 F.3d 990,
12 1020-21 (9th Cir. 2010) (finding that terms “expectation” and “mass communication” in
13 Washington disclosure law were sufficiently clear); *Gospel Mission of American v City*
14 *of Los Angeles*, 419 F.3d (1042, 1047-48 (9th Cir. 2005) (holding that statute regulating
15 “charitable solicitation” was not vague).

16 Plaintiff Unions know very well what they spend for political purposes. For
17 example, Plaintiff McLaughlin states in his declaration that the UFCW spends some
18 union treasury money on lobbying, ballot issues, and political polling. (Doc. 19, ¶ 5.)
19 Such money clearly was used for political purposes and those expenditures would shape,
20 at least in part, the union’s statement required by SB 1363. Just as the UFCW and Local
21 469 are capable of reporting what they spend on political activities in their LM-2 forms,
22 they can determine and report the “maximum percentage” of funds used for political
23 purposes under SB 1363. Their speculation about vagueness in hypothetical situations,
24 such as whether placing President Obama’s picture on a magazine cover is political issue
25 advocacy, does not render the law vague.

26 Nor does the inclusion of the phrase “similar group.” *See United States v.*
27 *Coleman*, 609 F.3d 699, 707 (5th Cir. 2010) (rejecting vagueness challenge to “similar
28 offenses” clause in 18 § 921(a)(20)); *United States v. Klecker*, 348 F.3d 69, 71-72 (4th

1 Cir. 2003) (holding that “substantially similar to” in statute was not vague); *cf. United*
 2 *States v. Clark*, 582 F.3d 607, 614-15 (5th Cir. 2009) (holding that “any other immoral

3 purpose” was not vague). The term clearly refers to groups comparable to a political

4 action committee, that is, special interest groups and issue-oriented organizations that

5 raise and contribute money for political causes. It is not vague.

6 Plaintiffs also find a lack of clarity in the term “annual authorization.” Subsection

7 A of SB 1365 provides that an employer shall not deduct any payment for political

8 purposes unless “the employee annually provides written or electronic authorization to

9 the employer for the deduction.” This language is not vague at all. People of reasonable

10 intelligence can understand it, just as they understand provisions of laws or agreements

11 that require them to periodically renew their insurance policies and vehicle registrations,

12 and to file tax returns. But it should be emphasized that subsection C of SB 1365

13 requires the Attorney General to adopt rules that “describe the acceptable forms of

14 employee authorization.” Those rules have not been promulgated yet, and that is part of

15 the reason why this case is unripe.

16 Finally, Plaintiffs complain about the statement in SB 1365 that the statute “does

17 not preempt any federal law.” This statement is merely an expression of legislative

18 intent that serves as an interpretive aid. The statement does not prohibit any conduct and

19 does not subject anyone to a criminal or civil penalty, and it is not an appropriate subject

20 of a vagueness challenge. In any event, similar preemption disclaimers are found in

21 many statutes. *See, e.g.*, 29 U.S.C. § 633(a). Research has disclosed no case suggesting

22 that such disclaimers are impermissibly vague.

23 **3. SB 1365 is not preempted by federal election law.**

24 Finally, Plaintiffs incorrectly argue that SB 1365 is preempted by the Federal

25 Elections Campaign Act (“FECA”). The statute states, in relevant part, that “the

26 provisions of the Act, and of rules prescribed under the Act, supersede and preempt any

27 provision of State law with respect to election for Federal office.” 2 U.S.C. § 453(a).

28 The Code of Federal Regulations explicitly states what activity is preempted by the

1 FECA. “Federal law supersedes State law concerning the (1) Organization and
2 registration of political committees supporting Federal candidates; (2) Disclosure of
3 receipts and expenditures by Federal candidates and political committees; and (3)
4 Limitation on contributions and expenditures regarding Federal candidates and political
5 committees.” 11 C.F.R. § 108.7(b). SB 1365 does not regulate any of these activities or
6 otherwise regulate elections to federal office.

7 The narrow wording of the statute indicates that Congress intended to preempt
8 state regulation only with respect to election-related activities. Even with respect to
9 election-related activities, courts have given FECA’s preemption provision a narrow
10 reading. *See, e.g., Reeder v. Kansas City Bd. Of Police Comm’rs*, 733 F.2d 543, 545-46
11 (8th Cir. 1984) (holding that § 453 did not preempt statute prohibiting police officers
12 from contributing to political campaigns); *State of Minn. V. Jude*, 554 N.W.2d 750, 752-
13 53 (Minn. 1996)(holding that FECA did not preempt state law regulating false campaign
14 advertising).

15 FECA does not preempt state regulation of non-election-related activities. *See*
16 *Stern v. General Elec. Co.*, 924 F.2d 472, 475 (2d Cir. 1991). In *Stern*, the Court held
17 that state law claims of corporate waste based on the corporations contributions to
18 federal political campaigns was not preempted by FECA. *Id.* at 475-76. Here, SB 1365
19 regulates the payment of wages, not federal elections. It requires Arizona employers to
20 obtain from covered entities a statement regarding the percentage, if any, of the amount
21 deducted from an employee’s paycheck for political purposes. This provision does not
22 regulate federal elections and is therefore not preempted.

23 Plaintiffs’ reliance on *Heller*, an unpublished decision by Nevada state trial court,
24 is misplaced. The *Heller* judge ruled that FECA preempted a state law but provided no
25 analysis or explanation. That ruling is entitled to no deference. Neither is *Vennatta v.*
26 *Keisling*, 151 F.3d 1215 (9th Cir. 1998), another case cited by Plaintiffs. That case was
27 analyzed and decided under the First Amendment and it is no longer good law anyway.
28 *See Montana Right to Life Ass’n v Eddleman*, 343 F. 2d 1085, 1091 n.2 (9th Cir. 2003).

1 The other two cases cited by Plaintiffs, *Teper v Miller*, 82 F.3d 989 (11th Cir. 1996), and
 2 *Weber v Heaney*, 995 F.2d 872 (8th Cir. 1993), involve direct state regulation of
 3 campaign contributions and are therefore inapposite.

4 **D. Plaintiffs Have Not Demonstrated Irreparable Harm.**

5 Plaintiffs allege that they will suffer inherent harm in the absence of a preliminary
 6 injunction. They have identified no actual harm. Having to develop new employee
 7 authorization forms does not qualify as irreparable injury. Plaintiffs say that they might
 8 lose revenue if some members forget to sign their authorizations, but that is pure
 9 speculation. Besides, even if some employees did forget, and their employer stopped
 10 deducting fees for political purposes from their paychecks, the unions must surely have
 11 methods of collecting late payments from forgetful members.

12 Plaintiffs have not shown a probability of success on the merits, but if there is any
 13 questions concerning the issuance of an injunction, the question of the alleged harm to
 14 Plaintiffs needs to be developed in discovery and at an evidentiary hearing.

15 **E. The Balance of Equities Weighs Against an Injunction.**

16 A party seeking injunctive relief must establish that the balance of equities tips in
 17 its favor. *Winter*, 55 U.S. at _____. In assessing whether Plaintiffs have met this burden,
 18 the court has a duty “to balance the interests of all parties and weigh the damage to
 19 each.” *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197,
 20 1203 (9th Cir. 1980). Even if some factors may favor the movant, a preliminary
 21 injunction should be denied if the balance of equities weights against it. *See Winter*, 129
 22 S. Ct. at 376 (holding that a preliminary injunction that interfered with the Navy’s ability
 23 to conduct effective, realistic training exercises was an abuse of discretion regardless of
 24 the plaintiffs’ showing of irreparable injury and likelihood of success on the merits).

25 SB 1365 serves an important public purpose. It ensures that wages are deducted
 26 from an employee’s paycheck only with the employee’s knowing authorization.
 27 Employees have a First Amendment right to make financial contributions for political
 28 purposes. They also have a First Amendment right to withhold political contributions.

1 *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1251, 1253 (6th Cir. 1997); *see also*
2 *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). SB 1365 protects those
3 rights. It enables employees to get information regarding the extent to which their pay is
4 being used for political purposes to make an informed and voluntary choice about it.
5 The protection of these rights far outweighs the inconvenience to the union of obtaining
6 annual authorizations.

7 **F. An Injunction Is Not In the Public Interest.**

8 An injunction would deprive covered employees in Arizona of the rights
9 protected by SB 1365 and would serve no public purpose.

10 **III. CONCLUSION**

11 Plaintiffs are not entitled to a preliminary relief. Their Motion for a Preliminary
12 Injunction (doc. 14) should be denied.

13 Respectfully submitted this 21st day of June, 2011.

14 Thomas C. Horne
15 Attorney General

16 s/Michael K. Goodwin
17 Michael K. Goodwin
18 Assistant Attorney General
19 Attorneys for Defendants

20 I certify that I electronically
21 transmitted the attached document
22 to the Clerk's Office using the
23 CM/ECF System for filing and
24 transmittal of a Notice of Electronic
25 Filing to the following, if CM/ECF
26 registrants, and mailed a copy of
27 same to any non-registrants, this
28 21st day of June, 2011, to:

1 Andrew J. Kahn
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